

This petition is directed against order dated 20-2-2007 vide which Additional Commissioner (CT), Legal in the Office of the Commissioner of Commercial Taxes, Andhra Pradesh, Hyderabad (respondent No.2) dismissed the stay application filed by the petitioner.

The petitioner is engaged in the business of selling medicines. It is registered as a dealer under the Andhra Pradesh General Sales Tax Act, 1957 (for short, 'the Act'). For the assessment year 2004-05, the petitioner filed return and claimed exemption on the entire turnover by asserting that it is the second seller of medicines in the State. Commercial Tax Officer, Vijayawada (respondent No.1) rejected the petitioner's plea and held it liable to pay tax under Section 5AA of the Act. He levied tax of Rs.2,77,528/-. The appeal preferred by the petitioner was dismissed by Appellate Deputy Commissioner (CT), Vijayawada vide his order dated 19-9-2006.

Feeling aggrieved by the appellate order, the petitioner filed further appeal before the Sales Tax Appellate Tribunal (for short, 'the Tribunal'). It also filed an application under Section 21 (6) of the Act for stay of the disputed tax. Respondent No.2 rejected the petitioner's prayer for stay by observing that it had failed to substantiate the claim for exemption.

Shri Dantu Srinivas argued that the assessment order and appellate order are liable to be declared as vitiated by an error of law apparent on the face of the record because respondent No.1 and Appellate Deputy Commissioner (CT), Vijayawada failed to consider the petitioner's claim for exemption in a correct perspective. He further argued that order dated 20-2-2007 is liable to be quashed because respondent No.2 did not apply his mind to the merits of the

case set up by the petitioner. Learned counsel emphasized that the use of the word “Diacardus” on the cartoons cannot lead to an inference that the petitioner was selling medicines with the trade mark of “Diacardus” and argued that the assessment made by respondent No.1 is liable to be nullified.

We have given serious thought to the arguments of the learned counsel, but have not felt persuaded to agree with him. A careful reading of order dated 10-4-2006 shows that the petitioner had used the word “Diacardus” as trade mark for selling the medicines. If that was not so, there was no reason for the petitioner to use this word not only on the cartoons, but also on the aluminum foils and strips.

While considering the petitioner’s plea for exemption, respondent No.1 observed as under:

“It is observed that there is vast difference between purchase value and sale value. The purchase value put to sale was Rs.12,44,825/- whereas the sales recorded was Rs.30,79,420/-. Since the dealers M/s.Diacardus are selling the medicines with Trade Mark Diacardus the turnover of Rs.30,52,809/- is taxable under Section 5A A of the APS|GST Act which reads as under:

5AA Levy of tax on trade mark holder:-

Notwithstanding anything contained in this Act whenever a dealer, who holds the trade mark or the patent thereof, sells goods other than the declared goods at any point of sale other than first point of sale, he shall be deemed to be the first seller in the State and he shall be liable to pay tax accordingly and for determining the tax due to be paid by him, the tax levied and collected at the preceding point of sale if any, on the same goods shall be deducted from the tax payable by him at that point of sale.

The outer cartons as well as the alluminium foils contain the words “Diacardus” and this is printed for marketing the goods with trade mark “Diacardus”. The turnover of

Rs.30,52,809/- is therefore taxable under Section 5A A of the APGST Act for the reasons explained above.

It is therefore proposed to levy tax under Section 5A A of the APGST Act on the turnover of Rs.30,52,809/- and subject the same to tax @10%. The dealers are however eligible for set off of tax paid on the purchase value and the same will be granted at the time of final assessment.

A show cause notice proposing assessment as detailed above was served on the dealers calling for objections. In reply to the show cause notice, the dealers have filed objections opposing the assessment proposed invoking the provision of Section 5A A of the APGST Act. The contention of the dealers is that the words "DIACARDUS" have been employed namely for purpose of indicating the name of the firm, but the goods in question are not sold with prefix "DIACARDUS" and therefore the provisions of Section 5A A have no application to the present case.

Another contention of the dealer is that Section 5A A applied only to a regd. trade mark holder and it will not apply to the regd. trade mark and the name "DIACARDUS" is the firm name. They have cited the definition of "Trade Mark" as defined in the Trade Mark Act, 1999 and concluded that tax provisions of Section 5A A applies only to the regd. trade mark holders. In support of their contention, they have relied upon the Supreme Court judgment in the case of ASTRA PHARMACEUTICALS (P) LTD. v. COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH, reported in Excise Law Times, 1995 (75) E.L. 7 214 (S.C.).

They further contended that the main reason for huge variation between the purchase and sale is due to administration and business expenses such as salary to representatives, employees etc. with the above objections, they requested to drop the proposed assessment.

The objections are examined. The similar issue has come up for discussion before the STAT in the case of Aditya Music, Hyderabad v. State of Andhra Pradesh reported in A.P.S.T.J. Volume 37, page 212. The STAT after considering dictionary meaning of the words "HOLD", "USE" and "HOLDER" are synonym words and the word "Trade Mark

Holder” u/s.5A A of the APGST Act refers to trade mark user only and held that the legislature is enacting Section 5A A and using the words holder of trademark evidently intended this section to apply to all holders of trade mark, whether registered or un-registered.

The Supreme Court judgment relied upon by the dealers has no application to the facts of the present case. The issue involving in the said case was distinction between house mark and product mark and the dextrose injections manufactured without Central Excise Licence were not patent and proprietary medicines dutiable under tariff item 14E of the schedule.

The STAT judgment in the case of Aditya Music, Hyderabad v. State of Andhra Pradesh squarely applies to this case and the facts in the present case are similar to the facts in the case of Aditya Music.

In the present case, the medicines selected by this dealer as exclusively manufactured for him by the manufacturer and both inner strips and outer cartoons contain the trade mark “DIACARDUS” and the manufacturer cannot manufacture these medicines to any other traders. The dealers case fall under Section 5A A of the APGST Act in view of STAT judgment in Aditya Music case referred to above. The objections are overruled as not maintainable and the proposed assessment is subjecting the turnover of Rs.30,52,809/- to tax @ 10% as discussed in the show cause notice is therefore confirmed.”

Appellate Deputy Commissioner (CT), Vijayawada expressed his agreement with respondent No.1 by making the following observations:

“As seen from the assessment order of the Commercial Tax Officer, the outer cartoons as well as the aluminium foils contains the word ‘diacardus’ and this is printed for marketing the goods with Trademark “Diacardus” and therefore the turnover is taxable under Section 5AA of the APGST Act. The medicines selected by the dealer as exclusively manufactured for him by the manufacturer and both inner strips and outer

contained contain the trademark. 'Diacardus' and the manufacturer cannot manufacturer these medicines to any other traders. The dealers case fall under Section 5AA in view of the judgment in Aditya Music Case."

Since the matter is subjudice before the Tribunal, we do not want to express any conclusive opinion on the petitioner's entitlement to exemption in terms of Section 5AA of the Act, but are prima facie convinced that the petitioner has failed to make out a case for entertaining his application for stay.

We are also in agreement with respondent No.2 that mere pendency of appeal does not warrant stay of the recovery of tax. If the petitioner succeeds in the appeal, the Tribunal may grant consequential relief. Therefore, the elements of balance of convenience and irreparable injury are clearly against entertaining of the prayer for stay.

For the reasons stated above, the writ petition is dismissed.

As a sequel to dismissal of the writ petition, WPMP No.7847 of 2007 filed by the petitioner for interim relief is disposed of as infructuous.

G.S. SINGHVI, CJ

March 29, 2007

C.V. NAGARJUNA REDDY, J

SVS